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IN THE SUPREME COURT OF THE STATE OF ALASKA

ESAU SINNOK, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, et al.,	)	
	)	
Appellees.	)	Supreme Court No. S-17297
	)	

Superior Court Case No. 3AN-17-09910 CI

BRIEF OF *AMICI CURIAE* ALASKA INTER-TRIBAL COUNCIL, EYAK PRESERVATION COUNCIL, AND NATIVE CONSERVANCY LAND TRUST IN SUPPORT OF APPELLANTS

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE GREGORY MILLER, PRESIDING

LAW OFFICE OF ROBERT JOHN

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Clerk of Court

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JURISDICTIONAL STATEMENT

Amici Curiae Alaska Inter-Tribal Council, Eyak Preservation Council, and the Native Conservancy Land Trust concur with the jurisdictional statement by the Appellants ("Plaintiffs").

STATEMENT OF ISSUES PRESENTED

Amici Curiae Alaska Inter-Tribal Council, et al., concur with the statement of issues presented by Plaintiffs.

STATEMENT OF THE CASE

Amici Curiae Alaska Inter-Tribal Council, et al., concur with the statement of the case presented by Plaintiffs.

STANDARD OF REVIEW

Amici Curiae Alaska Inter-Tribal Council, et al., concur with the standard of review presented by Plaintiffs.

INTEREST AND IDENTITY OF *AMICI CURIAE*

The Alaska Inter-Tribal Council (AITC) is a statewide, tribally governed, non-profit organization that advocates on behalf of tribal governments throughout the state. AITC promotes indigenous self-determination by providing technical assistance to tribal governments, facilitating inter-governmental and inter-agency communication and collaboration, offering public education regarding Alaska Native cultures and tribal governments, and advocating on behalf of tribal initiatives and self-governance.

AITC is greatly concerned about the impacts of climate change on their members. Living in the Arctic and sub-Arctic regions of Alaska, their members experience daily the

effects of climate change, including thinning sea ice, increased coastal erosion, melting permafrost, and changes in plant and animal distributions. Climate change is depleting the subsistence resources of the members of AITC and threatening their health, safety, and way of life. As a result, the members of AITC have an interest in ensuring that the State of Alaska takes the urgent action needed to reduce carbon dioxide (CO_2) emissions to the greatest degree possible.

The Eyak Preservation Council (EPC) is a 501(c)(3) nonprofit organization, based in Cordova, Alaska, with a mission to honor Eyak Heritage and conserve wild salmon culture and habitat through education, awareness, and the promotion of sustainable lifeways for all peoples. EPC works to link wild salmon habitat preservation, environmental justice, and cultural preservation with sustainable economic solutions. EPC works to foster its vision of sustainable communities in which society, economics, and education all reinforce the wild salmon way of life. EPC represents an Indigenous voice to deflect unsustainable development, regardless of the promoter of the project.

EPC's work is centered around preserving wild salmon's pristine habitat and ecosystems to ensure the survival of returning salmon, and also to preserve the traditional heritage and economies that depend upon wild salmon in Alaska. EPC understands that preserving wild salmon habitat cannot be accomplished without addressing the causes of climate change, and thus the organization has a strong interest in ensuring that young Alaskans, the future stewards of the wild salmon ecosystems in Alaska, can get their climate change injuries considered and remedied in a court of law. Working with a broad array of constituents, EPC provides value-focused programs to achieve the ultimate goal

of securing permanent protection for wild salmon habitat. Part of EPC's work includes creating a platform to teach, preserve, and revitalize the Eyak language, so that it can be carried on by future generations. There are currently seven key Eyak Native Learners.

The Native Conservancy Land Trust (Native Conservancy) has as its mission supporting Indigenous people's efforts to preserve, repatriate, and restore ancestral lands through the establishment of Indigenous land conservation trusts on sacred lands and waters that are inherent to the protection and perseverance of sovereignty, subsistence, spirituality, and Native culture. Its founding Native board formed the organization in 2003 with the Bering River Coal Fields in mind as their first conservation and stewardship goal. The Native Conservancy has helped permanently protect 62,000 acres (85%) of the Bering River Coal Field in December 2016. The Native Conservancy was the first Native-led land trust in Alaska. The Native Conservancy directly assists and empowers Indigenous people in Alaska to protect, preserve, restore, and enhance their intrinsic bond and inherent responsibility protect and preserve the sacred air, water, ancestral lands, wild food resources, and traditional way of life. Climate change poses a threat to the sacred Indigenous lands and waters that the Native Conservancy seeks to protect for all future generations.

SUMMARY OF ARGUMENT

This case involves the State of Alaska's constitutional duty to cease activities associated with its energy policy that cause and contribute to climate change, a phenomenon that is harming the youth plaintiffs in personal ways as described in the amended complaint. *See, e.g.,* First Amended Complaint at ¶¶ 14-91. Nowhere are the

effects of the high levels of greenhouse gas (GHG) emissions that cause climate change more severe than in the Arctic. Alaska has been characterized as the "canary in the coalmine" for climate change — polar sea ice is melting, glaciers are receding, permafrost is melting, and villages are being washed into the sea. The Trump Administration recently stated that "Alaska is on the front lines of climate change and is among the fastest warming regions on Earth."[1]

Amici submit this brief to describe the urgency of the situation and to emphasize what is at stake in this litigation: the physical and cultural survival of Alaska's Native people and communities. As alleged in the amended complaint, the Appellees ("Defendants") in this case have constitutional responsibilities to develop and implement energy policy in a way that does not result in harms to its youngest citizens. First Amended Complaint ¶¶ 7, 235, 237-239 (describing the Alaska Energy Policy that is causing the constitutional harm).[2] The discontinuation of energy policies and planning

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[1] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 1190 (2018), https://nca2018.globalchange.gov (last visited Mar. 19, 2019).

[2] The trial court found that no Alaska energy policy exists, but that finding erroneously contradicts the well-pleaded allegations in the Amended Complaint. *Kanuk v. State, Department of Natural Resources*, 335 P.3d 1088, 1091 (Alaska 2014) (all well pleaded facts in the complaint must be deemed as true for purposes of a motion to dismiss). Plaintiffs allegations that the State's energy policy is reflected in AS § 44.99.115(2)(A) and Defendants' clear pattern and practice of systemic actions with respect to fossil fuels and GHG emissions are undoubtedly sufficient at this stage of litigation. Plaintiffs should have an opportunity to present specific factual evidence consistent with their allegations to show the contours of Alaska's energy policy and that the policy, as alleged, results in substantial amounts of GHG emissions that are causing and contributing to the youth's injuries. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) (on a motion to dismiss "general allegations embrace those specific facts that are necessary to support the claim."); *see also, e.g.*, Alaska Energy

that contribute to the devastating impacts of climate change in Alaska is a critical step to ensure the survival of Alaska's Native communities. Judicial review of legislative and executive actions that threaten the existence and way of life of Alaskan children is not a political question, but one that must be heard and decided by the courts. *State, Dep't of Health & Soc. Services. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001). Thus, we join Plaintiffs in urging this Court to reverse the dismissal of this case and to remand it to the trial court so that Plaintiffs' important constitutional claims can be heard and resolved.

ARGUMENT

I. INTRODUCTION & SCIENTIFIC BACKGROUND

> *"We are experiencing things in one lifetime that should take five or six generations. . . . We are making do with less (subsistence food) and trying to make the most of it."*
> — Ronald Brower Sr. speaking on behalf of the Inuit Circumpolar Conference (ICC).[3]

Alaska's Native people comprise eleven distinct cultures. As recognized by the Alaska Native Heritage Center, these cultures are generally organized into five cultural

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Wiki, *History of Energy Policy in Alaska*, http://energy-alaska.wikidot.com/history-of-energy-policy-in-alaska ("Alaska has a history of energy planning and policy development dating from statehood in 1959."); *id.* ("In 1979, under Governor Jay Hammond, the state articulated its first energy policy . . . ."); *id.* ("For example, the 1981 State Long Term Energy Plan (the first of six such plans . . . ."); *id.* ("State energy policy early in this decade is reflected in the 2003 Statewide Energy Issues Overview, a product of the Alaska Energy Policy Task Force.").

[3] Margaret Bauman, *Conference Attendees Receive an Account of Arctic Warming*, *Peninsula Clarion* (Nov. 30, 2005). The ICC is an international organization representing about 155,000 Inuit living in the Arctic regions of Alaska, Canada, Greenland and Chukotka, Russia.

groupings that draw upon cultural similarities or geographic proximity: the Athabascan of the Interior and Eastern Alaska; the Yup'ik and Cup'ik of Western Alaska; the Inupiaq and St. Lawrence Island Yupik of the Northern and Northwestern Arctic; the Aleut and Alutiiq of Southcentral Alaska and the Aleutian Islands; and the Eyak, Tlingit, Haida, and Tsimshian of the Southeastern archipelago.[4] The people of these cultures have occupied the land we know as Alaska for thousands of years.[5] They rely upon, are connected with, and have a sophisticated knowledge of, the natural Arctic environment. This physical and spiritual relationship can be encapsulated by the term "subsistence." The U.S. Congress has defined subsistence as "the customary and traditional uses . . . of wild, renewable resources" for food, clothing, sharing, or other customary uses.[6] Congress also has recognized the importance of Alaska Native subsistence by exempting subsistence activities from the general application of some federal environmental statutes that impair the exercise of subsistence rights.[7] Alaska Natives also use traditional knowledge that is helpful to the Court in considering the issues in the case.[8]

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[4] U.S. Fish and Wildlife Service, *Visiting and Listening Meaningful Participation for Alaska Native Peoples in Conservation Projects* 4 (2012).

[5] *Id.;* Norman A. Chance, *The Inupiat and Arctic Alaska: An Ethnography of Development*, 17-18 (Harcourt 1990).

[6] Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3113.

[7] *See, e.g.,* Endangered Species Act, 16 U.S.C. §1539(e) (exempting Alaska Natives from take provisions "if such taking is primarily for subsistence purposes"); Marine Mammal Protection Act, 16 U.S.C. § 1371(b) (exempting Alaska Natives from Act's take provisions if take "is for subsistence purposes"); Migratory Bird Treaty Act, 16 U.S.C. § 712(1) (enabling Secretary of Interior to permit Alaska Natives to take migratory birds and collect their eggs for seasonal subsistence use); Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3114 (establishing subsistence preference for fish and wildlife uses on public lands). The term "take" generally means to harass, hunt, capture,

After surviving and thriving in a difficult environment for many millennia, Alaska Native cultures face a daunting challenge as anthropogenic climate change is drastically changing the Arctic and sub-Arctic ecosystems in a way that threatens Alaska Natives' very existence.[9] According to the United States Global Change Research Program,[10] climate change is unequivocally human-induced,[11] is occurring now, and is projected to accelerate if GHG emissions continue increasing.[12] Climate change is damaging both

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or kill, or attempt to harass, hunt, capture, or kill the species protected under the various statutes. *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C. § 1361 (13).

[8] *See, e.g.*, The White House, *National Strategy for the Arctic Region* 3 (2013), https://arctic-council.org/images/PDF_attachments/09_13_2018_nat_arctic_strategy.pdf ("Traditional knowledge refers to a body of evolving practical knowledge based on observations and personal experience of indigenous communities over an extensive, multigenerational time period.").

[9] ACIA Overview Report, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* 5 (2004) (This report is an overview of the full ACIA Scientific Report published in 2005).

[10] "The U.S. Global Change Research Program (USGCRP) is a Federal program mandated by Congress to coordinate Federal research and investments in understanding the forces shaping the global environment, both human and natural, and their impacts on society." The organization is comprised of "13 Federal agencies that conduct or use research on global change and its impacts on society, in support of the Nation's response to global change." U.S. Global Change Research Program, http://www.globalchange.gov/about (last visited Mar. 14, 2019).

[11] U.S. Global Change Research Program, *Climate Change Impacts in the United States* 7 (2014), https://nca2014.globalchange.gov/ ("Multiple lines of independent evidence confirm that human activities are the primary cause of the global warming of the past 50 years."); U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 78 (2018) ("Greenhouse gas emissions from human activities are the only factors that can account for the observed warming over the last century; there are no credible alternative human or natural explanations supported by the observational evidence.").

[12] U.S. Global Change Research Program, *Climate Change Impacts in the United States* 15 (2014) ("Human-induced climate change is projected to continue, and it will accelerate significantly if global emissions of heat-trapping gases continue to increase.");

natural and human systems, and if GHG emissions continue as they are today, will alter the planet's habitability.[13]

Human beings have significantly altered the chemical composition of the Earth's atmosphere and its climate system,[14] by engaging in activities that produce or release GHGs into the atmosphere. For example, through its energy policy, Alaska has approved and undertaken activities that result in significant GHG emissions. *See, e.g.,* First Amended Complaint ¶¶ 219-233 (describing Alaska's share of GHG emissions that result from actions of the Defendants). Carbon dioxide (CO_2) is the primary GHG, and there is unequivocal scientific evidence that emissions of CO_2 from burning fossil fuels are largely responsible for global warming and climate change.[15] The increase of GHG concentrations resulting, in part, from activities that Defendants authorize through their energy policy, has altered the delicate balance of Earth's energy between the energy

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U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* 35 (2017) ("Global climate is projected to continue to change over this century and beyond. The magnitude of climate change beyond the next few decades will depend primarily on the amount of greenhouse (heat-trapping) gases emitted . . .").

[13] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 36 (2018) ("Climate change is transforming where and how we live and presents growing challenges to human health and quality of life, the economy, and the natural systems that support us.").

[14] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (2017).

[15] *See* James E. Hansen *et al.*, *Target Atmospheric CO_2: Where Should Humanity Aim?* 2 Open Atmos. Sci. 217, 217-231 (2008).

coming in through the atmosphere from the sun and that which radiates back out into space.[16]

The current CO_2 concentration in our atmosphere is over 410 ppm (compared to the pre-industrial concentration of 280 ppm).[17] Current atmospheric CO_2 concentrations are the highest they have been in at least 800,000 years.[18] Concentrations of other GHGs in the atmosphere have also increased from human activities. Atmospheric concentrations of methane, for example, have increased by a factor of about 2.5 since the pre-industrial period.[19] Concentrations of nitrous oxide have also increased.[20] Humans not only continue to add GHGs into the atmosphere at a rate that outpaces their removal through natural processes,[21] but the observed CO_2 increase over the past 60 years is about 100 times faster than has occurred over the past 800,000 years.[22]

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[16] First Amended Complaint ¶¶ 136, 141.

[17] Nat'l Oceanic and Atmospheric Admin., *Trends in Atmospheric CO_2*, https://www.esrl.noaa.gov/gmd/ccgg/trends/global.html; Nat'l Oceanic and Atmospheric Admin., *Carbon Dioxide Levels Breach Another Threshold at Mauna Loa* (June 7, 2018), https://www.noaa.gov/news/carbon-dioxide-levels-breach-another-threshold-at-mauna-loa (last visited Mar. 21, 2019).

[18] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* 87 (2017); U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 100 (2018) ("Atmospheric carbon dioxide concentrations are now higher than at any time in the last 3 million years. . . .").

[19] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* 83 (2017).

[20] *Id.*

[21] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 40 (2018) ("Humans are adding carbon dioxide to the atmosphere at a rate far greater than it is removed by natural processes, creating a long-lived reservoir of the gas in the atmosphere and oceans that is

The effects of this planetary warming are being seen in changes in Earth's climate, weather, plants, animals, and every aspect of the natural environment. All of these changes are impairing the ability of Alaska Natives, who are connected to this natural environment and rely upon it, to maintain their cultural identity and way of life. The Trump Administration has recognized that "[t]he impacts of climate change will likely affect ***all aspects*** of Alaska Native societies, from nutrition, infrastructure, economics, and health consequences to language, education, and the communities themselves."[23]

II. GLOBAL WARMING THREATENS THE PHYSICAL AND CULTURAL SURVIVAL OF ALASKA NATIVES

> *"Time is running out for the Arctic. We need far-reaching, long-term global commitments to reduce emissions of greenhouse gases if the Arctic is to be protected and if our human rights, particularly our human rights to subsistence, are to be respected."*
> — Sheila Watt-Cloutier, ICC Chair.[24]

For millennia, Alaska Natives have used their sophisticated knowledge and experience of the sea, ice, land, and animals to thrive in a harsh environment. The living resources of the Arctic and sub-Arctic regions of Alaska not only sustain the economic

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driving the climate to a warmer and warmer state.").

[22] Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide* (Aug. 1, 2018), https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide; Dieter Lüthi *et al.*, *High-resolution Carbon Dioxide Concentration Record 650,000-800,000 Years Before Present* 453 Nature 379, 379-382 (May 2008).

[23] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* 1188 (2018) (emphasis added); *see also* U.S. Global Change Research Program, *Climate Change Impacts in the United States* 17 (2014) ("Climate change poses particular threats to Indigenous Peoples' health, well-being, and ways of life.").

[24] *Threat to North's Cultural Survival*, ECO 2 (Dec. 2003).

and nutritional viability of Alaska Native communities, they also provide a basis for social identity, spiritual life, and cultural survival.[25] As these communities have observed, the Arctic and sub-Arctic is an environment at risk, threatening their existence and way of life.[26] The sea ice is declining, anomalous weather patterns are becoming more frequent, vegetation cover is changing, and particular animals are no longer found in traditional hunting areas during the expected seasons.[27]

Since the 1970s, Alaska Natives also have noticed and reported environmental changes outside the bounds of "normal" variability.[28] They have reported sightings of species like American robins, whose normal range does not include the Arctic.[29] Several communities have observed changes in the health and behavior of caribou, a key subsistence species.[30] In the Pribilof Islands, villagers have witnessed the decline of 20 species, ranging from kelp to sea lions.[31] The presence of 20 new ocean fish species, not part of traditional subsistence harvests have been confirmed in the Chukchi and Beaufort

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[25] Conservation of Arctic Flora and Fauna, *Arctic Biodiversity Assessment: Report for Policy Makers* 4 (2013).

[26] ACIA Overview Report, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* 94 (2004).

[27] *Id.*

[28] Sheila Watt-Cloutier *et al.*, *Responding to Global Climate Change: The Perspective of the Inuit Circumpolar Conference on the Arctic Climate Impact Assessment, 2° Is Too Much! Evidence and Implications of Dangerous Climate Change in the Arctic* 57, 59 (World Wildlife Fund 2005).

[29] Larry D. Hinzman *et al.*, *Evidence and Implications of Recent Climate Change in Northern Alaska and Other Arctic Regions*, 72 Climatic Change 252, 286 (2005).

[30] *Id.*

[31] Margot Roosevelt, *Vanishing Alaska: Global Warming is Flooding Villages Along the Coast. Should They Surrender and Move*? Time Magazine (Sept. 27, 2004).

exposed to the consequences of Alaska's decision to pursue an energy policy that is contributing to climate change.

> *Change is clearly accelerating in the Arctic, and it has global implications for us all. We all have a stake in this future, but none more than the young people who are coming of age, living in the midst of this change.*
> -United Nations Environment Program[118]

CONCLUSION

The climate change impacts taking place in Alaska that the Alaskan government is contributing to through its energy policy and implementing actions are among the most dramatic on Earth. The devastating and knowing destruction of the Arctic is happening right now and must be stopped. Ceasing the government's unconstitutional actions in pursuing an energy policy that is affirmatively harming the youth plaintiffs is an essential step in ensuring the survival of Alaska's Native communities. Thus, we urge this Court to overturn the dismissal of the case brought by Alaska youth, including Alaska Native youth, and to remand it to the trial court so that these youth can have their day in court.

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[117] *See e.g.*, Johanna Eurich, *Newtok is on the move*, Alaska Public Media (Dec. 28, 2018), https://www.alaskapublic.org/2018/ 12/28/newtok-is-on-the-move/; Denali Commission, *Village Infrastructure Protection Program* (2017).

[118] UN Environment Program. *Global Linkages – A Graphic Look at the Changing Arctic* 6 (2019).

RESPECTFULLY SUBMITTED this 26th day of March, 2019.

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Law Office of Robert John